No. 10056

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

MONARCH BREWING COMPANY, a corporation,

Appellant,

vs.

GEORGE J. MEYER MANUFACTURING COMPANY, a corporation,

Appellee.

APPELLANT'S OPENING BRIEF.

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TOPICAL INDEX.

PAGE

TABLE OF AUTHORITIES CITED.

CASES. **PAGE**

STATUTES.

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Jurisdictional Statement.

This is an appeal by the plaintiff from a summary judgment for the defendant, in an action for damages, in the sum of $214,155.78, for the breach of a warranty in respect to the quality, nature and fitness of certain bottling machinery to do certain work, the plaintiff being a corporation organized and existing under the laws of the State of California, and a citizen of the State of California, and the defendant being a corporation organized and existing under the laws of the State of Wisconsin, and being a resident of the State of Wisconsin.

Statement of the Facts Presented by the Pleadings.

Unless otherwise indicated references are to page numbers of the Transcript of Record.

This is an appeal by plaintiff from a judgment in favor of the defendant on plaintiff's claim entered pursuant to an order made granting defendant's motion for a summary judgment.

Plaintiff's amended complaint alleges that prior to February 14, 1938, plaintiff was using certain bottling machinery which required seventeen men to operate, the maximum production of which was 15-cases of 11-ounce Steinie bottles per day, at a cost of 9¢ per case, and that prior to February 14, 1938, plaintiff advises defendant that plaintiff was desirous of acquiring machinery which would increase plaintiff's daily bottling output over that turned out by the bottling machinery plaintiff then had, and at a reduced cost of operation. [Tr. p. 25.]

The amended complaint further alleges that defendant thereupon advised plaintiff that defendant was the manufacturer of certain bottling machinery, described as follows:

> 1 #516 Qt. Meyer Dumore Bottle Cleaner complete with motor and continuous soaker drive, 1840 bottles immersed,
>
> 1 40 valve Meyer Dumore Filler,
>
> 1 #1050 Meyer Cataract Pasteurizer. [Tr. p. 28];

which machinery, defendant represented to plaintiff, required 20-men to operate and would bottle 3600 cases

of 11-ounce Steinie bottles per day, at a cost of approximately 4½¢ per case [Tr. p. 26]; that defendant having full knowledge of plaintiff's requirements, recommended that plaintiff purchase the last above described machinery, and that thereupon plaintiff entered into a contract with defendant, dated February 14, 1938 [which contract is set forth in full at page 8 of the Transcript of Record], whereby plaintiff purchased and defendant sold the machinery described in the said contract, for a total of $52,700.00. [Tr. p. 28.] That at the time of entering into said contract plaintiff had no knowledge of the quality, fitness or capacity of said machinery, and in entering into said contract plaintiff wholly relied upon the representations of the defendant as to the quality and fitness of such machinery to perform the work required by the plaintiff. [Tr. p. 29.]

Plaintiff's amended complaint consists of two causes of action. By the first cause of action plaintiff seeks to recover damages for breach of an implied warranty, in respect to the capacity, fitness and quality of the above described bottling machinery sold by defendant to plaintiff under the terms of said contract of February 14, 1938, which implied warranty is predicated upon the fact that plaintiff made known to defendant the purpose for which the machinery was required and relied upon defendant's judgment that the machinery would meet plaintiff's requirements.

It appears from the face of such contract that it was signed by the plaintiff in Los Angeles, California, February 14, 1938, and then mailed to the defendant and accepted by the defendant, by the signing thereof by its officers at Cudahy, Wis., on February 19, 1938.

The contract contains the following clauses:

> "Only the goods as specified in detail below—f.o.b. cars factory Cudahy. Verbal understandings are not binding unless specified in this contract."
>
> * * * * * * * *
>
> "Seller guarantees the proper working of goods sold under reasonable operation thereof, according to Seller's instructions, and agrees to issue full credit for all parts of its manufacture, returned F.O. B. factory within two years from date of shipment, which in Seller's opinion are defective or worn out through normal use. Seller shall not be liable for delays, damages or consequential damages, in shipment, erection, or in operation of above goods. This guarantee does not apply to brushes, brush tubes, electrical equipment, gauges, instruments or procurable commercial parts." [Tr. p. 8.]

The gross selling price of the items set forth in said contract is $52,700.00. This amount was reduced to a net of $41,880.00, by reason of the deduction of $1120.00, because of plaintiff's election not to purchase the Basement Extension [Tr. pp. 46-47], and by reason of the further deduction on account of a special discount in the sum of $9700.00. $3500.00 was paid on the contract upon the execution thereof, leaving a balance of $38,380.00. On December 6, 1938 the contract was modified as to the terms of the payment of the then balance of $28,380.00, by the signing of a subsequent contract in Los Angeles by the plaintiff on De-

cember 6, 1938, and the acceptance, by the signing thereof by the defendants, at Cudahy, Wisconsin, on February 7, 1939. A copy of the last mentioned contract is attached to defendant's answer. [Tr. p. 67.]

Pursuant to said contract and the modification thereof, the machinery described in Exhibit "A", with the exception of the Basement Extension, was delivered by the defendant to a common carrier, F.O.B. cars, at Cudahy, Wisconsin, and transported by such common carrier to the plaintiff at Los Angeles, California. [Tr. p. 29.] Upon the machinery being received in Los Angeles, plaintiff caused the same to be put into place, under the supervision of an engineer furnished by defendant, and attempted to operate the same. [Tr. p. 29.] The machinery having failed to operate, as defendant represented it would, the plaintiff notified defendant, and the employees of defendant devoted 313 hours of labor in an unsuccessful attemp to place said machinery in proper working order, for which service the defendant made no additional charge against plaintiff. [Tr. p. 30.]

The amended complaint further alleges that plaintiff deferred commencement of action on the breach of the implied warranty because of its reliance upon defendant's repeated representations that defendant would eventually be able to make the machinery operate in a proper manner. [Tr. p. 31.]

The special damages resulting proximately, directly and solely from the breach of defendant's implied warranty, for which plaintiff seeks recovery by his first cause of action, in the sum of $214,155.78, are set forth

in paragraph 7 of its amended complaint, and may be summarized as follows:

(a) Present and future wages of men necessary to operate said machinery in excess of the number of men represented to be necessary to operate the machinery,	$37,978.14
(b) The value of the beer lost by reason of the failure of the machinery to pasteurize the beer with the degree of efficiency with which defendant represented the machinery would pasteurize the beer,	13,363.62
(c) The loss of profits due to adverse publicility arising from the fact that some of the beer bottled by the machinery in question was not pasteurized with the degree of efficiency with which the defendant represented the machinery would pasteurize the beer,	50,192.00
(d) Loss of caustic soda used in operating the machinery, in excess of that which defendant said would be sufficient to enable the machinery to properly cleanse the bottles,	19,380.00
(e) The value of the beer lost due to failure of the machinery to maintain a proper filling level, in accordance with defendant's representations,	1,262.63
(f) The loss due to depreciation in excess of the rate of depreciation which defendant represented the machinery would have,	27,920.00
(g) Cost of replacing defective parts of the machinery,	5,261.23

(h) Labor costs expended and to be expended in endeavoring to put the machinery in good operating order and the value of labor lost resulting from temporary shut-downs, caused by failure of the machines to properly operate, 58,798.16

[Tr. pp. 31-40.]

Plaintiff's second cause of action is predicated upon breach of the express warranty and guaranty contained in the written terms of the contracts above referred to, which guaranty is hereinabove quoted. [Tr. pp. 40-43.]

Defendant, by its answer to plaintiff's amended complaint, has set up various defenses. However inasmuch as the sole question presented on this appeal is whether or not the defendant's motion for summary judgment was properly granted, that is, whether the amended complaint stated a cause of action, it is not necessary at this time to consider the various defenses alleged by defendant's answer.

The motion for summary judgment is based upon but two propositions:

1. Plaintiff's action is barred by the waiver of consequential damages contained in the contract;

2. Parol evidence will not be admissible on the trial of an action to establish implied warranty, because the contract provided "verbal understandings are not binding unless specified in this contract."

ARGUMENT.

I.

By Virtue of the Rule of Ejusdem Generis the Phrase, "Damages" or "Consequential Damages" Contained in the Waiver Clause of the Contract Sued Upon, the Only Damages Waived Thereby Were Consequential Damages and the Court Erred in Failing to Limit the Waiver Clause to Such Consequential Damages.

The clause of the contract in question reads:

> "Seller shall not be liable for delays, damages or consequential damages, in shipment, erection, or in operation of above goods. This guarantee does not apply to brushes, brush tubes, electrical equipment, gauges, instruments or procurable commercial parts." [Tr. p. 8.]

It was the contention of the plaintiff upon the hearing of the motion for summary judgment in the trial court, that the clause in question only exempted the defendant from liability for consequential damages, caused by the concurrence of the acts of the defendant and some other event, and not for the direct damages here sought to be recovered, which were proximately and solely caused by the breach of the express and implied warranty sued upon.

On the other hand the defendant contended, and the trial court held, that if consequential damages were construed to mean those attributable to the interposition of

Specification of Errors.

Appellant Monarch Brewing Company hereby specifies the following errors of the trial court upon which it relies upon this appeal:

1. The Court erred in granting defendant's motion for summary judgment in its favor as to each and every claim asserted against defendant by plaintiff's amended complaint, filed August 9, 1941, which motion was granted October 8, 1941.

2. The Court erred in failing to hold, in accordance with the rule of *ejusdem generis,* that the waiver clause contained in the contract was limited to consequential damages.

3. The Court erred in holding that the waiver clause in question waived claims for all recoverable damages, and erred in failing to hold that the consequential damages waived by the terms of the contract were only those special damages which might be caused by the negligent act of the defendant, so continuous in its nature that the concurrent wrongful act which precipitated the damage would not be deemed an independent wrong, but as conjoining with the original act of defendant in creating the disastrous result.

4. The Court erred in failing to find that the parties had placed such a practical construction on the contract by their conduct as to require the Court to hold that the waiver contained in the contract would not bar the plaintiff's action for the damages here sought to be recovered.

5. The Court erred in failing to hold that plaintiff's action is not barred by the statute of limitation or laches, it having retained the machinery at defendant's request,

in order to afford defendant an opportunity to place the machinery in working order so as to comply with defendant's representations and plaintiff's requirements, the plaintiff having deferred commencement of its action in reliance upon defendant's representations that it would place the machinery in such working order as to comply with defendant's representations and plaintiff's requirements.

6. The Court erred in failing to hold that surrounding circumstances upon which an implicit warranty is predicated may be shown by parol testimony, notwithstanding the contract was reduced to writing and contained a statement that the parties were not bound by any verbal understanding, the contract not having contained a detailed statement of the warranty.

7. The Court erred in failing to hold that the alleged waiver of damages contained in the contract and relied upon by the defendant is repugnant to the preceeding clause expressly guaranteeing the working of the machinery, and hence the former clause containing the guaranty must be deemed to be controlling, and the subsequent inconsistent waiver rejected.

some independent clause, other than acts of the defendant, there would have been no necessity for inserting such provision in the contract.

At the outset it is to be noted that the term "consequential damages" is preceded by the words "damages or". It is our contention that the general term "damages", as thus used, is limited by the immediately following phrase "consequential damages", to those damages of the latter class.

In the Matter of Petition of Johnson, 167 Cal. 145, defendant was charged with violation of *Section 593* of the *Penal Code,* which made it unlawful to interfere with wires used for the purpose of transmitting electricity for light, heat and power. Defendant contended that *Section 593* was repealed by the amendment in 1905 to *Section 591* of the *Penal Code,* which made it unlawful to interfere with any telephone or telegraph lines or any other lines used to conduct electricity. The court, in holding the amendment to *Section 591 Penal Code* did not repeal *Section 593 Penal Code,* because the clause "or any other line used to conduct electricity" under the rule of *ejusdem generis* must be limited in its application to wires of the same general nature, said at page 145:

> "It is true that the words 'or any other line used to conduct electricity' might be interpreted in certain juxtapositions as referring to electric light and power lines. Used as they are in Section 591, following the enumeration of telephone and telegraph lines, they doubtless come within the rule of con-

> struction known as *ejusdem generis* and refer to things of the same general nature as those specified. In such cases the particular words are inserted for the purpose of describing certain species and the general words to include other species of the same genus. The rule is founded upon the reason that if the general words are intended to prevail in their full and unrestricted sense the special words would not be employed by the lawmakers at all."

In *People v. Strickler,* 25 Cal. App. 60, defendant was charged with selling intoxicating liquor containing ninety-five hundredths of one per cent per volume of alcohol, which act the state contended constituted violation of the Wyllie Local Option Law, which defined alcoholic liquors as follows:

> " 'The term "alcoholic liquors" as used in this act shall include spirituous, vinous and malt liquors, and any other liquor or mixture of liquors which contain one per cent by volume, or more, of alcohol and which is not so mixed with other drugs as to prevent its use as a beverage.' "

It was contended by defendant that by virtue of the rule of *ejusdem generis* the only sale of spirituous, vinous or malt liquors which was prohibited by the statute was such as contained one per cent of alcohol, while the attorney general contended that the prohibition was not restricted to liquors containing alcohol. The appellate court sustained the defendant's contention, and in dis-

cussing the application of the rule of *ejusdem generis* to the facts presented in that case, said at page 65:

> "In its practical application, this rule simply means that 'general and specific words which are capable of an analogous meaning, being associated together, take color from each other, so that the general words are restricted to a sense analogous to the less general.'"

The court, in pointing out that the rule is applicable to the construction of contracts as well as to statutes, said at page 65:

> "'Where a statute *or other document* (italics ours) enumerates several classes of persons or things, and immediately following and classed with such enumeration the clause embraces 'other' persons or things, the word 'other' will generally be read as 'other such like', so that persons or things therein comprised may be read as *ejusdem generis* with, and not of a quality superior to or different from, those specifically enumerated.'"

In *Henne v. Summers,* 16 Cal. App. 67, the lessor under a five year lease brought an action against the surety on a bond executed by the lessee and the defendant Summers as surety, to secure the full performance of all obligations contained in said lease and also the payment of the last two months' rent to become due and payable as therein specified. After one year the lessee's assignee became bankrupt and the lessor leased the property to one Harris, resulting in an unpaid balance of $2700.00, which would have accrued under the original lease. The defendant contended that the guarantee in so far as the payment of rent was concerned only applied

to the payment of the last two months' rent and that the condition of the bond in respect to the performance of all obligations contained in the lease referred to obligations other than the payment of rent. The court in sustaining this contention said, at page 71:

> "It is settled law that to give effect to the intention of the parties, general words may be restrained by a particular recital which *follows* them, when such recital is used by way of limitation or restriction." (Italics ours.)

To the same effect see *Milwaukee County v. Badger Chair and Furniture Co.*, 269 N. W. 659, 223 Wis. 117.

In the present case the word "damages" contained in the clause under consideration is necessarily limited in its application by the following specific terms "consequential damages".

Thus limited it becomes apparent that the exemption relied upon by defendant does not embrace all damages, but only embraces consequential damages.

It must be apparent from the definition of consequential damages, that the damages which were waived by the terms of the contract were those which might be caused by the concurrence of an act of the defendant with some other event, perhaps in the erection of the machinery, at plaintiff's plant, rather than the direct damages resulting solely from a breach of the warranty as to the capacity and fitness of the machinery.

II.

Consequential Damages Are Those Which Are Special Rather Than General, and Are Caused by the Concurrence of Some Other Event Attributable to the Same Origin and Cause, That Is, Attributable to the Negligent Act of Defendant, So Continuous in Its Nature That the Concurrent Wrongful Act Which Percipitated the Damage Will Not Be Deemed an Independent Wrong, but as Conjoining With the Original Act of Defendant in Creating the Disastrous Result. Therefore the Court Erred in Holding That the Waiver Clause in Question Waived Claims for All Recoverable Damages.

A waiver of claim for consequential damages does not waive a claim for damages caused without the concurrence of some other event such as the negligence of a third person, or the operation of natural forces, and the court erred in holding that a waiver of consequential damages must be deemed to be a waiver of all recoverable damages.

The measure of damages for breach of a contract is prescribed by *Section 3300, Civil Code,* which is as follows:

> "For the breach of an obligation arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom."

We believe that the most accurate definition of consequential damages is that found in *Loiseau v. Arp* (S. D.), 14 L. R. A. (N. S.) 853, in which plaintiff brought an action for possession of two colts belonging to plaintiff which defendant had taken possession of and held as security for damages alleged to have been inflicted upon a colt of the defendant by reason of being bitten by plaintiff's colts while trespassing on defendant's property. The evidence showed that the defendant's colt was injured while attempting to get over the fence. The court held the proximate cause of the injury to defendant's colt was his attempt to get over the fence rather than the fact that plaintiff's colts were unlawfully trespassing on defendant's property. The court, in pointing out the distinction between direct and consequential damages, said at page 858:

> " 'Again, damages are either direct or consequential. The former are such as result from an act without the intervention of any intermediate controlling or self-efficient cause. The latter are such as are not produced without the concurrence of some other event attributable to the same origin or cause. Proximate damages are those that are the ordinary and natural results of the defendant's act, such as are usual, and might therefore have been expected.' "

A definition of consequential damages, as stated in *Loiseau v. Arp, supra,* is quoted with approval by the U. S. Circuit Court of Appeals, 7th Circuit (Wis.) in the case of *Christman v. United States,* 74 Fed. (2d) 112, at 114 and 115. In that case the plaintiff sought damages for the overflow of its land by reason of the construction and maintenance of a dam by the United States. It appears that the land was not overflowed solely by rea-

son of the erection and maintenance of the dam, but by reason of that fact, coupled with water coming down from freshets in the hills. In approving the definition of consequential damages as stated in the case of *Loiseau v. Arp, supra*, the court said at page 114:

> "Such damages are those which do not arise as an immediate or natural and probable result of the act of the party, but as an incidental consequence. The courts have followed quite generally this definition. A well expressed statement is that in Loiseau v. Arp, 21 S. D. 566, 114 N. W. 701, 703, 14 L. R. (N. S.) 855, 130 A. St. Rep. 741, where the court said, 'Damages are either direct or consequential. The former are such as result from an act without the intervention of any intermediate controlling or self efficient cause. The latter are such as are produced without the concurrence of some other event attributable to the same origin or cause.' "

The court further, in pointing out no recovery could be had because the flood was caused by the building of the dam, coupled with the freshets coming down from the hills, said at page 115:

> "The line of demarcation between the Sanguinetti case and the Cress case is very narrow, but, apparently, to give effect to the two decisions, the court below was justified in saying that the damages here involved only an indirect result of the building of the dam and are the consequential result of that fact coupled with the intervention of other elements, the existence of which was not due to the building of the dam."

Section 3911 of the *Civil Code of Georgia,* defines consequential damages as

> "such as are the necessary and connected effect of the tortious act, though to some extent depending upon other circumstances."
>
> *Dublin v. Ogburn,* 82 S. E. 939, 142 Ga. 40.

It is our contention that the liability for damages, in respect to which it is sought by the contract here in question to exempt the defendant, was a liability for damages resulting from the continuing wrong of the defendant coupled with the concurrent negligent action of a third person, or the operation of natural forces which ultimately precipitated the damages. An example of such damages would be those arising from the concurrence of the negligence of the defendant in furnishing an independent contractor equipment, known by defendant to be defective, for use in erecting the machinery with the negligence of the independent contractor in using such defective equipment resulting in damage to the plaintiff.

The contract here in question was signed by the buyer in Los Angeles, California, February 14, 1938, and forwarded to the seller at Cudahy, Wisconsin, where it was signed by the officers of the defendant seller corporation, on February 19, 1938. By the terms of the contract the machinery was sold F. O. B. cars, factory, Cudahy, Wisconsin. [Tr. p. 8.] Accordingly, the goods were delivered by the seller to the common carrier at Cudahy, Wisconsin, and transported to Los Angeles. [Tr. p. 29.] The contract also provided that the buyer should keep the property insured.

Under such circumstances the contract was made in Wisconsin, the state in which the last act was done

which was necessary to be done to make the agreement a binding contract. (*Michelin Tire Co. v. Coleman, etc.*, 179 Cal. 587; *Fitzhugh v. University Realty Co.*, 46 Cal. App. 198.)

The goods having been delivered by the seller to the carrier, F. O. B. cars, at Cudahy, Wisconsin, the contract was also made in Wisconsin.

These propositions are amply supported by the decision in the case of *City etc. v. Weber Packing Corporation,* 73 Pac. (2d) 1272 (Utah), which was an action for damages for breach of an implied warranty in respect to ketchup sold by the defendant to plaintiff. In that case the court declared:

> "It would seem the contract of purchase was made and performed in Utah. The order for the goods was solicited from the grocery company on behalf of the packing corporation by a broker in Kansas City, Mo. The written contract of sale was signed by the grocery company at Kansas City and sent to Ogden, where it became a binding obligation on the part of both parties upon acceptance and execution by the packing corporation.
>
> "A contract between parties in different states is made at the place where the last act necessary to give it validity is performed. Lawson v. Tripp, 34 Utah 28, 95 P. 520.
>
> "The written contract provided: 'Terms: F.O.B. seller's factory, sight draft with bill of lading.' The buyer was to carry its own insurance and 'Notwithstanding shipped to seller's order, goods are at risk of buyer from and after delivery to carrier.' * * *
>
> "The catsup was received, paid for, and lodged in plaintiff's warehouse at Kansas City.

> "We have, therefore, a Utah contract, fulfilled by the packing corporation by delivery of the goods to a carrier for transportation to Kansas City in interstate commerce."

The contract in the present case not being effective until accepted by the seller in Wisconsin, and the goods having been sold f.o.b., Cudahy, Wisconsin, the buyer to keep the goods insured, the contract was not only made but fully performed in Wisconsin when the goods were delivered by the seller to the carrier.

Section 1646 of our Civil Code provides that a contract is to be interpreted according to the law and usage of the place where it is to be performed; or if it does not indicate a place of performance, according to the law and usage of the place where it is made.

It appearing from the above authorities that the contract in question in the instant case was both made and performed in Wisconsin, the contract is to be construed and interpreted according to the law and usage of Wisconsin, and hence the consequential damages in respect to which the defendant was exempted from by the terms of the contract are only those arising from the continuing wrong of defendant. coupled with the concurrent negligence of a third person, or the operation of natural forces.

The California cases are uniform in holding that if the action of either of two or more persons constitute a proximate cause of the injury complained of, both or either are liable for the resulting damages sustained.

In *Merrill v. Los Angeles Gas & Elec. Co.*, 158 Cal. 499, plaintiff brought an action against defendant gas company for damages for personal injuries sustained

by the plaintiff as the result of a gas explosion in a restaurant in which plaintiff was eating. The proprietor of the restaurant had discovered a leak in defendant's gas line, and advised the gas company of such fact, and was told to shut off the gas stove. This the proprietor failed to do and the explosion followed. Defendant contended the explosion was caused by the negligence of the proprietor of the restaurant rather than by that of the gas company. The court, in holding that if an injury is caused by the conjoined or concurrent acts of two or more parties, both are liable, said at page 505:

> "And, so, Judge Ray's definition is not to be accepted in its fulness, nor to be accepted at all, without the important further modification that the original act of negligence, the primary causation, may be in its nature so continuous that the concurrent wrongful act precipitating the disaster will in law be regarded not as independent, but as conjoining with the original act to create the disastrous result."

Again in the case of *Sawdey v. Producers' Milk Co.*, 107 Cal. App. 467, an action was brought for damages for wrongful death of Mildred E. Sawdey. The car in which deceased was riding ran into the rear of the truck which was driven by an employee of the defendant Rasmussen Company, such driver having left the truck unattended in a used portion of the highway. The two cars became locked together, and, while deceased was thus placed in a position of danger, a car driven by an employee of the Standard Creameries Company ran into

the two standing cars. The court, in affirming the judgment for plaintiff against Rasmussen Company, although the injury was immediately precipitated by the operator of the creamery company truck, said at page 480:

> "It is well-established law that the original wrongful act may be so continuous that the action of a third person precipitating the disaster will, in law, be regarded as not independent, but as joining with the original act to produce the accident." (Citing authorities.)
>
> "The mere fact that one of several concurring causes may not have been reasonably anticipated is not enough to shield from liability him who sets in motion the other; for it is well settled that the negligence complained of need not be the sole cause of the injury. It is enough to show that it is a proximate concurring cause; that is, one that was so efficient in causation that, but for it, the injury would not have occurred." (Citing authorities.)
>
> "It has been held and is the law of this state that where an injury results from two separate and distinct acts of negligence by different persons operating and concurring simultaneously and concurrently, both are proximate causes and recovery may be had against either or both of the responsible persons."

In *McKay v. Hedger,* 139 Cal. App. 266, an action was brought to recover damages for personal injuries sustained by a child when running from behind an ice truck which had double parked beside a bakery truck, both of which cars were headed west. The plaintiff was struck by an east bound automobile. The vision of the driver of the automobile which struck the children was obstructed by the double parking of the ice truck. The court, in

affirming the judgment against the ice company, even though the injury of the boy was immediately caused by being struck by the east bound automobile, that is, by the independent act of a third person, said at page 275:

> "The rule is stated in Hale v. Pacific Telephone & Telegraph Co., 42 Cal. App. 55, 183 Pac. 280, and approved in Sawyer v. Southern Cal. Gas Co., 206 Cal. 366, 274 Pac. 544, that 'where the original negligence of a defendant is followed by an independent act of a third person which results in a direct injury to a plaintiff, the negligence of such defendant may, nevertheless, constitute the proximate cause thereof if, in the ordinary and natural course of events, a defendant should have known the intervening act was likely to happen; but if the intervening act constituting the immediate cause of the injury was one which it was not incumbent upon the defendant to have anticipated as reasonably likely to happen, then, since the chain of causation is broken, he owes no duty to the plaintiff to anticipate such further acts, and the original negligence cannot be said to be the proximate cause of the final injury.'"

In *Fennessey v. Pacific Gas & Electric Company,* 10 Cal. (2d) 538, plaintiff sought damages for personal injuries resulting from being run into by an automobile operated by one Manecis, while plaintiff was standing in a safety zone and while Manecis was operating his car to the left of such safety zone, by reason of the fact that the defendant's tower car was parked between the curb and such safety zone, when not in actual use in

repairing the wires of the defendant electric company. Plaintiff had judgment against Manecis only. The defendant gas and electric company appealed from an order granting plaintiff a new trial as against defendant electric company. The court, in holding the original proximate cause is not always arrested by the intervention of an independent, concurrent cause, said at page 544:

> "Another instruction was as follows: 'If you believe from the evidence that both defendants were negligent, and you further believe that the negligence of the defendant Manecis was an *independent intervening act* which was the efficient cause of the injury to plaintiff, then your verdict must be in favor of the Pacific Gas & Electric Company.' (Italics ours.) Proximate causation, it has been held, is not always arrested by the intervention of an independent concurring cause."

In *Cummings v. Kendall,* 34 Cal. App. (2d) 379, as in *Sawdey v. Producers Milk Co., supra,* plaintiff sought damages for personal injuries resulting from the car operated by appellant running into the rear of the car in which plaintiff was riding, after the car in which plaintiff was riding had run head on into the car operated by a third person. Appellant contended he could not see the car operated by the third person, but he did hear the impact but failed to immediately apply his brakes. The court, in denying that one can escape liability for his own negligence, even though the injury would not have

been caused but for the negligence of a third person, said at page 382:

> " 'Under the principle stated in the foregoing section, if the negligence of defendant *is one of the proximate causes of the injury of which the plaintiff complains,* he cannot escape liability by showing that the negligence of a third person also contributed to the injury, and that the accident would not have happened but for such negligence of the third person.' "

It is to be seen that in each of these cases the defendant, whose negligence was but one of the proximate causes of the injury, was held responsible for the resulting injuries, although such injuries would not have resulted but for the concurrent negligence of some third person. In other words, the injuries were produced by the concurrence of some act of negligence of defendant with some other event, or act of a third person, attributable to the same origin or cause.

We submit that it was the liability for injuries resulting from such concurrent causes that the parties by the contract in question sought to relieve the defendant from and when so construed all of the provisions of the contract can be given effect without doing violence to any of them. So construed the contract would not exempt defendant from liability for any damages here sought to be recovered, all of which were directly and proximately caused by breach of the implied warranty and express warranty contained in the contract, without the concurrence of any other event.

III.

The Court Erred in Failing to Find That the Parties Had Placed Such a Practical Construction on the Contract by Their Conduct as to Require the Court to Hold that the Waiver Contained in the Contract Would Not Bar Plaintiff's Action for Damages Here Sought to Be Recovered.

We have heretofore pointed out that after plaintiff discovered that the machinery did not meet the terms of the implied warranty, nor the requirements of the plaintiff, as disclosed to the defendant before the making of the contract, the defendant proceeded to devote 313 hours, without charge, to plaintiff, in an attempt to adjust the machinery so that it would comply with plaintiff's requirements. [Tr. p. 30.] Such action clearly demonstrates that the parties by their conduct so construed the contract as to render defendant liable for plaintiff's claims for damages arising from the defects which resulted in the damages which we have hereinbefore enumerated, and so as to preclude defendant from relying upon the alleged waiver contained in the contract.

In *Holbrook v. Petrol,* 111 Fed. (2d) 967, plaintiff, as receiver, brought an action for the alleged balance due for oil delivered to defendant in excess of the money advanced by defendant to the receiver. During the performance of the contract the price of gasoline, to which the crude oil sold under the contract was correlated, fell below the minimum price of gasoline set forth in the schedule contained in the contract. During this period the defendant rendered monthly statements, showing the amount allowed for each delivery of oil. To these statements the receiver made no objection and his account-

ings were settled accordingly by the Federal Court, and in reliance upon such action by the receiver the defendant continued to advance money to the receiver. The court, in holding that this was a case in which the rule as to the practical construction of the contract by the parties applied, and in discussing the operation of such rule, said at page 969:

> "It is clear, in view of the ambiguities of the contract, that we have here a case for the application of the rule that the practical construction of the contract by the parties may be considered in determining their intent. The principle was thus stated by Mr. Justice Swayne in delivering the opinion of the court in Brooklyn Life Insurance Co. v. Dutcher, 95 U. S. 269, 273, 24 L. Ed. 410: 'The practical interpretation of an agreement by a party to it is always a consideration of great weight. The construction of a contract is as much a part of it as anything else. There is no surer way to find out what parties meant, than to see what they have done. Self-interest stimulates the mind to activity, and sharpens its perspicacity. Parties in such cases often claim more, but rarely less, than they are entitled to. The probabilities are largely in the direction of the former. In considering the question before us, it is difficult to resist the cogency of this uniform practice during the period mentioned, as a factor in the case." (Citing authorities.)

In *Cowles v. Independent Elevator Co.*, 22 Cal. App. (2d) 109, the guest of a hotel, brought an action for damages for personal injuries alleged to have been caused by the negligent manner in which the defendant inspected

the elevator of the hotel. Under the contract between the hotel and the defendant, it was provided that the defendant's service should consist of a thorough and complete going over of the elevator apparatus, oiling, greasing, cleaning and adjustments. The court, in holding that the testimony of the inspector employed by defendant, to the effect that such service included the correction of defects, was admissible to establish the practical construction which the parties had placed on the contract in respect to the duties of the defendant thereunder, said at page 113:

> "The testimony of which the defendant complains was by its inspector, who described the service defendant had rendered, which included not only an examination of the manner in which the elevator was working, but also the correction of defects, particularly those appearing in the electrical apparatus and connections used in its operation. This testimony was competent for the purpose of showing the construction placed on the contract by the parties (6 Cal. Jur., Contracts, sec. 184, p. 304), and although not expressly pleaded, the defendant was not prejudiced by its admission."

See also:

Duff v. Anderson, 50 Cal. App. 397;

Bayles v. Browning, 133 Cal. App. 618;

Burgess v. California Mutual B. & L. Assn., 210 Cal. 180;

Hunt v. United Bank & Trust Co., 210 Cal. 108.

IV.

The Plaintiff's Action Is Not Barred by the Statute of Limitations or Laches, It Having Retained the Machinery at Defendant's Request, in Order to Afford the Defendant an Opportunity to Place the Machinery in Such Working Order as to Comply With Defendant's Representations and Plaintiff's Requirements, and Plaintiff Having Deferred the Commencement of Its Action in Reliance Upon Defendant's Representations That It Would Place the Machinery in Such Working Order as to Comply With Defendant's Representations and Plaintiff's Requirements.

It appears from paragraph VI of the amended complaint that after plaintiff discovered that the machinery in question was incapable of fulfilling the purpose for which the plaintiff represented to defendant that plaintiff required the machinery, the defendant represented to plaintiff that defendant would be able to make the machinery operate in accordance with the implied warranty and pursuant to such representation the defendant devoted 313 hours between May and July, 1938, in attempting to so adjust said machinery that it would comply with the implied warranty and meet plaintiff's requirements, and that plaintiff relied upon such representations in deferring the commencement of its action for damages for breach of implied warranty, the defendant having continued to make such representations up to shortly prior to the commencement of this action. [Tr. pp. 30-31.]

In *American Rumely Thrasher Co. v. McCoy,* 213 Cal. 226, the court at page 232 said:

> "The record establishes that each time the defendant gave notice to the plaintiff that he refused to accept the harvesters because of breakdowns and defects, the agents of the seller attempted to reconstruct and repair the machines in an endeavor to put them in a satisfactory condition so as to obtain an acceptance by the defendant. We cannot say on the record that the trial court was not justified under the authorities cited and under the terms of the contract in concluding that the evidence did not disclose such operation of the harvesters by the defendant as would constitute an acceptance."

In *Ray v. American Photo Player Co.,* 46 Cal. App. 311, the same rule was announced by the court in the following language at page 316:

> "A principal may not take the benefit of a transaction of his agent on behalf of the principal, and deny the authority of the agent. The retention of the benefit constitutes a ratification of the act of the agent. The appellant contends that the plaintiff waived his right to rescind by making the payment he was induced to make by the new promise, and by failing to rescind more promptly. The defendant cannot rely upon delays which have been the result of indulgence it induced the plaintiff to extend to it."

We submit upon these authorities that the plaintiff cannot be held to have accepted the machinery and that the plaintiff's action upon the implied warranty is not barred by reason of any delay in commencing the action, inasmuch as the delay was induced by defendant's representations that the machines would be placed in good working condition.

V.

Surrounding Circumstances Upon Which an Implied Warranty Is Predicated May Be Shown by Parol Testimony Notwithstanding the Contract Was Reduced to Writing and Contained a Statement That the Parties Were Not Bound by Any Verbal Understanding, the Contract Not Having Contained a Detailed Statement of the Warranty, or a Detailed Description of the Goods.

In *Fox v. Harvester etc. Works,* 83 Cal. 333, it was held that parol evidence was admissible to show that the agent of the seller represented to the buyer that a certain harvester would cut, thrash and clean from 20 to 25 acres of grain per day, the only warranty contained in the written contract being that the harvester was "warranted to do good work". In this connection the court instructed the jury as follows:

> " '3. If you find, from the evidence, that L. U. Shippee was the general agent of defendant to sell machines, and that said Shippee, in order to induce plaintiffs to purchase said two machines in the complaint mentioned, represented to plaintiff and warranted that said machines would cut, thrash, and clean from twenty to twenty-five acres of grain per day; and if you further find, from the evidence, that said machines, when properly handled and run, would not cut, thrash, and clean from twenty to twenty-five acres of grain per day,—then you will find a verdict for the plaintiffs.' " (Pages 337-338.)

The court, in holding it proper to so instruct the jury, said at page 343:

> "We think the instructions 1, 3 and 5 were properly given. They were applicable to the evidence. Instruction 5 was in accordance with the testimony as to representations referred to in it, which were properly submitted to the jury, to determine whether or not they were intended by defendants as warranties."

In *Inner Shoe Tire Co. v. Tondro,* 83 Cal. App. 689, the court stated the rule as follows:

> "Where the written order does not contain a detailed description of the goods bargained for in the first instance, it is proper to show that the defendant was induced to enter into the agreement by the representations contained in placards and literature shown by plaintiff through its agent."

In *Williams v. Lowenthal,* 124 Cal. App. 179, plaintiff brought an action to recover the balance of the purchase price of a musical instrument known as an orchestrope. The conditional sales contract simply contained a statement of the time and amount of installment payments to be made, and contained a statement that no warranty or guarantee was given, unless specified in the written agreement, which was declared to contain the entire contract between the parties. At the time of the execution of the contract the seller represented that it was a good machine. While the court held defendant failed to show a breach of any express warranty, nevertheless, the court,

in pointing out that under the circumstances an implied warranty arose by operation of law, said at page 185:

> "It is, however, generally recognized that although there is no express warranty of fitness, nevertheless the law will imply a warranty that the article sold is reasonably adapted to the purpose for which it is purchased. (35 Cyc. 408; Lamb v. Otto, 51 Cal. App. 433, 197 Pac. 147.) Section 1735 of the Civil Code, added by the legislature of 1931, declares that there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract to sell or a sale except under certain conditions therein specified. Subdivision 1 of the section sets out the only conditions which are here applicable. This subdivision is in the following language:
>
> '(1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose.'
>
> It may be conceded that, notwithstanding the absence of an express warranty of fitness, nevertheless the circumstances presented by the evidence were such that a warranty that the instrument was fit for the purpose for which it was sold was raised by implication of law."

In *Luitweiler etc. Co. v. Ukiah etc. Co.,* 16 Cal. App. 196, the court quoted from *Hault v. Baldwin,* 67 Cal. 610, as follows:

> "The supreme court declared that 'Having taken the machine under a warranty, whether it be that expressed in the writing or provided by the code, or both, the defendant had the right, if there was a breach of the warranty, that is, if in any respect the machine was not what it was warranted to be, to rescind the sale by returning or offering to return it to the plaintiff.'"

In *Tracy Brick etc. Co. v. Wurster,* 44 Cal. App. 652, the court said:

> "Furthermore, it appears that the writing itself is silent as to any warranty of the materials which would be furnished in accordance with its terms; and this being so, the admission of parol evidence as to the existence, either of oral warranties made during the inception of the transaction between the parties, or of such implied warranties, as arose by operation of law from the making of either oral or written agreements between the manufacturer and the purchaser of such materials as furnished the subject matter of the transaction between the parties, could not be held to vary the terms of the written agreement in question. It was not error, therefore, for the court to admit such evidence."

In *American S. R. Co. v. Joshua Hendy Iron Works,* 94 Cal. App. 289, the court in pointing out that the implied warranties mentioned in Section 1735 of the Civil Code are deemed to be incorporated in every contract, said at page 291:

> "And, as above shown, it is the established rule in this state that these warranties implied by law may be deemed incorporated in the contract." (Citing numerous authorities.)

It thus becomes apparent that upon the trial of the action plaintiff will be entitled to prove the implied warranty pleaded in the first cause of action, predicated upon the fact that plaintiff made known to defendant the particular purpose for which the machinery was required and relied upon defendant's judgment and representation that it would meet plaintiff's requirements, notwithstanding the provision in the contract to the effect that "verbal understandings are not binding unless specified in this contract", for such implied warranty is deemed to be incorporated into the written terms of the contract.

Moreover, as pointed out under the next subdivision of this brief, the contract contains an express warranty that, "Seller guarantees the proper working of the goods sold under reasonable operation thereof, according to seller's instructions", upon which express warranty plaintiff will likewise be entitled to recover upon proof of its breach, as it is inconsistent with, and repugnant to, the subsequent alleged waiver of damages.

VI.

The Waiver Contained in the Contract and Relied Upon by the Defendant Is Repugnant to the Preceding Clause Expressly Guaranteeing the Working of the Machinery, and Hence the Former Clause Containing the Guaranty Must Be Deemed to Be Controlling and the Subsequent Inconsistent Waiver Rejected.

The language of the clause contained in the guarantee is as follows:

> "Seller guarantees the proper working of goods sold under reasonable operation thereof, according to Seller's instructions."

Such guarantee is followed by the alleged waiver relied upon by the defendant, which is in the following language:

> "Seller shall not be liable for delays, damages or consequential damages, in shipment, erection, or in operation of above goods."

It is apparent that if the latter of these two clauses be construed to constitute a waiver of damages of every nature, such clause is inconsistent with the preceding clause containing the guarantee. Such being the case the preceding clause must be given effect and the subsequent clause rejected.

In *Burns v. Peters,* 5 Cal. (2d) 619, the beneficiary and purchaser under a trust deed recorded December 13, 1930, sought to quiet title against a judgment creditor

who purchased the property on execution sale had in connection with an action in which an attachment was issued and levied on the property, May 4, 1931. Defendant contended that the trust deed created no lien and passed no title to the trustee because the trustee had not accepted the trust before the recordation of the trust deed, as required by one of the clauses of the trust deed, such provision having been preceded by other clauses declaring the trust deed to have been executed to secure payment of the indebtedness therein described. The court, in holding that if the two clauses were held to be repugnant the former should be accepted and the latter rejected, said at page 623:

> "The general rule is that where two clauses of a contract cannot be reconciled the first shall be received and the latter rejected. (6 R. C. L. 847.)"

It necessarily follows that if the guarantee of the proper working of the machine be held to be repugnant to the subsequent provision in respect to the alleged waiver for claim of damages herein sought to be recovered, the clause containing the guarantee must be accepted as binding on the parties and the subsequent clause in respect to the alleged waiver of the claim for damages must be rejected.

Conclusion.

Consequential damages are those caused by the concurrence of some other event with some act of negligence on the part of the defendant, and which other event is attributable to the same origin or cause. It not being contended that the damages here sought to be recovered resulted from the concurrence of any other event with the negligence of defendant, the waiver relied upon by defendant, which by virtue of the rule of *ejusdem generis* is limited in its operation to consequential damages, does not operate to bar plaintiff's action for the direct damages proximately caused by the breach of defendant's implied warranty, without the interposition of any other independent cause. Neither is plaintiff's action barred by the provision in the contract that no verbal understandings are binding on the parties, because the implied warranty shown to exist became by operation of law a part of the written contract.

Moreover the practical construction of the contract, evidenced by the conduct of the parties, shows that the parties did not intend that the plaintiff should have been deemed to have waived their claim for damages here sought to be recovered.

Respectfully submitted,

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